

Can Parliament Exercise Effective Control over the Emergency Legislation?

Dániel Karsai

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Former constitutional judge, Professor Imre Vörös, has recently expressed his opinion in the [Hungarian](#) press and on this [blog](#) by stating that the infamous powers enshrined in [Act XII of 2020 on the containment of coronavirus \(Enabling Act\)](#) can be only repealed by Parliament “with prior consent of the government”. According to Imre Vörös, this is a completely unprecedented limitation of parliamentary powers. I cannot fully agree with the professor’s views for the following reasons. In fact, the National Assembly is still able to repeal the Enabling Act and also the decrees enacted by the Government.

Professor Vörös argues that pursuant to Section 8 of the Enabling Act – “Repeal of this Act shall be decided by the National Assembly upon the end of the period of state of danger.” – withdraws the right of the Parliament to repeal the legislation that was passed by the same Parliament. The reason for this is that a state of danger may be terminated only by the Government pursuant to Section 54 paragraph (3) of the Fundamental Law. Imre Vörös asks the rhetoric question: Is it possible in a parliamentary democracy that an authorisation (in this particular case, the continuation of the governmental decrees that were issued based on the authorisation of the government until the end of the state of danger) can only be revoked with the consent of the authorised entity itself?

Of course, the answer to this question is no – provided that the underlying assumption was correct. In my professional view, however, it was not a correct assumption. The Parliament has not lost its right to repeal the Enabling Act at any time. It is indeed true that in accordance with Section 8 of the Act such a repeal would become possible upon the end of the period of state of danger, which is defined by the government. At the same time, the declaration of the state of danger did not remove the original and full legislative powers of Parliament.

The Fundamental Law’s functioning and applicability were not suspended pursuant to Section 54 paragraph (2) of the Fundamental Law, Section 1 (2) b) and it is therefore still applicable, and stipulates that legislation is passed by the National Assembly. What could prevent the National Assembly from amending Section 8 of the Enabling Act and to decide that it shall cease to be in force from the following day? There is no impediment to such a parliamentary decision. Consequently, I believe that the main arguments invoked by Professor Vörös are lacking a justifiable ground. It would be worthwhile to clarify the real constitutional concerns with regard to the Enabling Act.

The actual concern is not *if* but for *how long*

The real problem with the Enabling Act is that the legislation allows the emergency regulations of the government to remain in force for an unforeseen period – until the end of the state of danger – without any parliamentary control. Section 3 paragraph (1) of the Enabling Act authorises the government to keep the regulations – originally effective for 15 days – until the state of danger persists.

I would like to make corrections to some inaccuracies widely present both in the Hungarian and international public discourse. The authorisation given to the government is not without limits. The authorisation has a clear and exact passing that coincides with the end of the state of danger. However, this end is unforeseeable, since one cannot know when the state of danger ends. The decision thereon is within the discretion of the government pursuant to Section 54 paragraph (3) of the Fundamental Law. The two mandates – authorisations – are not identical. However, it must be stressed that even if the authorisation given to the government is not unlimited and lasts ‘only’ for a defined period of time, it still raises very serious constitutional concerns.

The reason for this is that the government – with its emergency decrees and regulations – restricts fundamental rights to an unprecedented degree. Some of these restrictions are constitutionally justifiable in themselves, such as the lockdown measures, which have, for example, to a large extent restricted the right to the freedom of movement. However, such a grave restriction of rights for an unforeseen period violates the Fundamental Law and the rule of law. Furthermore, there are a number of government decrees whose content is unconstitutional in itself, amongst others the [Governmental Decree No. 179 of 2020 \(V.4.\) on the derogations from provisions regulating data subject requests and addressing data processing activities during state of danger](#) that makes it impossible to access data of public interest or [Governmental Decree 136/2020 \(IV.17.\) on the establishment of a Special Economic Zone in the city of Göd](#) that deprives the city of Göd of its rights. The continuation of these unconstitutional decrees, for an unforeseen period further aggravates the impairment of rights.

A possible remedy for this situation would be fixed-term governmental decrees which require parliamentary consent to prevent their expiration. Yet, this question and the temporal effect of the Enabling Act are two different issues.

Professor Vörös formulates another disputable argument. In his view, there are no safeguards provided whatsoever in the Enabling Act to which Parliament may withdraw its consent for the continuation of certain regulations prior to the end of the state of danger. According to Professor Vörös, government can pass regulations identical to that of the repealed decree at any time, as long as the Enabling Act is effective and in force.

There is an even more serious problem that arises regarding the revocability of those governmental acts. Can the authorisation be revoked at all? Section 3 paragraph (1) of the Enabling Act gives the government the right to decide autonomously whether it wishes to maintain or revoke their decrees as long as the state of danger persists.

In fact, paragraph 2 of the same Section enables the Parliament on principle to withdraw this authorisation but upon closer examination one may find that it is loaded with serious contradictions and shortcomings. First of all, has Parliament provided anything extra or has it delivered additional safeguards? Well, not really, since they could amend the authorising provisions of the Enabling Act and they could revoke the legislative authorisation stipulated therein at any time.

There are serious concerns regarding the type of legislative act with which Parliament could withdraw its delegation of power. According to Section 1 (i) of the Fundamental Law the National Assembly shall take decisions relating to the special legal order. Does that mean that a simple decision by Parliament or an amendment to the Enabling Act or a completely new act is required to revoke these delegated powers? Personally, I cannot give a clear answer to this question.

Secondly, it is not really clear whether Parliament can withdraw the authorisation only in general terms or also with respect to individual governmental decrees. Section 3 paragraph (2) refers to the mandate provided in paragraph (1) only in general terms, which is a general mandate, issued regarding all Governmental Decrees. However, I am inclined to say that 'less is more' can be applied here based on the principle of the rule of law and that of common sense. It means that Parliament can withdraw the authorisation for the continuation of the scope of the legislative act not in a general sense, but with regard to specific governmental decrees.

If the Parliament revokes its authorisation for a specific regulation, what will happen to that piece of legislation? At the time when the specific regulation was drafted, the Government rightly decided – since it was authorised to do so – to maintain the temporal effect of these regulations until the end of the state of danger. This will lead to the bizarre situation that after the revocation of the special authorisation the regulation itself is still in force, since it was lawfully adopted earlier, and its 'master', the government has not repealed it. Consequently, there will be a norm in the legal system that should not be there, because no one has formally repealed it.

An interpretation that is still somewhat compatible with the rule of law may be that, the Government is, in this case, obliged to immediately repeal the decree. However, such substantive rules are not stipulated neither in the Fundamental Law nor in the Enabling Act. It means in practical terms that the legal institution of repeal is completely inapplicable and void of meaning. More specifically, Parliament can withdraw the authorisation for the continuation of the temporal effects of government decrees *pro futuro*, but such decision would not affect existing regulations, which would be the whole point.

The way out

There could be a way to cut this Gordian knot. Pursuant to Section 10 (3) a) aa) of Act CXXX of 2010 on legislation (Legislation Act) a governmental decree may be repealed by law. Section 1 (2) b) of the Legislation Act stipulates that the Legislation Act may be applied with derogations as set out in the Act on measures available for special legal order. This law is the Disaster Management Act, which does not

prescribe any different rule as to whether the governmental decrees passed in a state of danger could be repealed by law.

Therefore, the Parliament can repeal, even by a simple majority, any governmental decree enacted during the state of danger. Anytime. The Legislation Act provides that parliament can only use this tool when the original authorisation for enacting the government decree is no longer in force (Section 10 (3) ba of the Legislation act). Therefore, the parliament must first withdraw the original authorisation and then repeal the contested government decree.

It means that theoretically the Parliament has a powerful instrument in its hands. The theoretical aspect is to be stressed, however, since the Fidesz majority would certainly not adopt such measures that aim to keep the legislative process during a state of danger in check.

With reference to the observation of Imre Vörös, according to which the government can pass regulations identical to that of the repealed decree at any time, as long as the Enabling Act is effective and in force – it's a statement that I respectfully dispute.

When the Parliament withdraws its confidence from a regulation that constitutes a criticism of the content this emergency legal norm shall no longer be part of the Hungarian legal system. Should the Government pass the same regulation under a different decree number, it would be a clear violation of Section 53 paragraph (3) of the Fundamental Law, pursuant to which such decrees require parliamentary consent if their temporal effect exceeds 15 days.

The revocability of the authorisation, combined with the possibility of making governmental decrees enacted during the state of danger null and void could therefore, in theory, constitute a relevant legal boundary over the government's legislative powers during an emergency. Regarding politics: since Fidesz has a solid parliamentary majority, the chance for this legislative check to prevail is rather minimal. This is why the reference made by the minister of justice on the revocability of this authorisation (which partly was the reason for Imre Vörös to publish his article) is therefore completely without relevance and weight.

In conclusion, the main problem with the Enabling Act is not that repealing the law itself is subject to the fact whether the state of danger ends or not. The real constitutional concern is that the government can decide on the continuation of the emergency governmental decrees for an unforeseen period and that the Parliament does not intend to control their scope. This authorisation is not unlimited, but it is valid for an unforeseen period and there are serious doubts regarding its actual revocability, even if, as we have seen, the Parliament can in principle annul the government decrees enacted during the state of danger. This is a violation severe enough of the rule of law to sound the alarm even to Europe.

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